No. 14195.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALEXANDER SWAN, 2D.,

Appellant,

vs.

THE FIRST CHURCH OF CHRIST, SCIENTIST, IN BOSTON, MASSACHUSETTS, etc., *et al.,*

Appellees.

PETITION FOR REHEARING.

EUGENE L. WOLVER,
437 South Hill Street,
Los Angeles 13, California,
Attorney for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

STATUTE

TEXTBOOKS

No. 14195.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALEXANDER SWAN, 2D.,

Appellant,

vs.

THE FIRST CHURCH OF CHRIST, SCIENTIST, IN BOSTON, MASSACHUSETTS, etc., *et al.,*

Appellees.

PETITION FOR REHEARING.

The petition of the appellant, Alexander Swan, 2d, for a rehearing of the within cause, respectfully represents and shows:

Opinion.

The opinion of this Honorable Court was filed on the 30th day of August, 1955.

That the basic determinations thereof, are as follows:

1. That Federal jurisdiction exists, since the appellees are *"de jure"* corporations under the laws of the Commonwealth of Massachusetts;

2. That the first and second causes of action of the complaint fail to state an actionable claim in that it is not therein indicated that the refusal of the appellees to comply with the appellant's demand to reinsert his name as a practitioner in the list of the official publication of the appellee church, was not contrary to any contractual obligation and the same were properly dismissed *with prejudice;*

3. That the summary judgment as to the third cause of action of such complaint, that the same did not constitute any actionable claim, was properly granted by the trial court.

Subject Hereof.

The first contention of the court, namely, that jurisdiction exists, being requisite to the consideration hereof and favorable to appellant, no further discussion herein, thereof, will be had.

No request is herein made for a rehearing on the third subject of such opinion, namely, the court's summary judgment as to the third count of the appellant's second amended complaint.

The petition and request for rehearing is solely predicated upon, directly to, and concerns the second matter of the opinion, namely, the legal propriety of the dismissals *with prejudice,* as to the first two counts of said complaint.

ARGUMENT.

I.

That the First and Second Counts of Appellant's Second Amended Complaint Each State an Actionable Claim.

This Honorable Court, in its Opinion, summarizes and predicates such opinion upon the following résumé of the first and second causes of action of appellant's said complaint:

> ". . . His complaint is that although he had once been a Christian Science practitioner and had his name listed in the official publications of the Church, yet after he had withdrawn his name from the list and later requested that his name be reinstated as a practitioner defendant failed to accede to this request. It is not alleged that there was any contractual obligation which required defendants to do this, and the facts alleged fail to disclose that the refusal of the defendants to comply with appellant's demands constituted a breach of any other kind of duty or constituted a tort or other actionable wrong. . . ."

This succinct statement of fact, although accurate in the limited segments of the factual situation of the within cause, contained therein, is neither accurate nor factual, in regard to the actual situation, the relationship between the litigants and the position of each litigant, as well as the spirit of such relationship and the purpose of the list herein involved. Had the list been a commercial list, used for advertising purposes by those who desired to subscribe to its services, and been published solely for such purpose, the premises of said factual statement contained in the Opinion of this Honorable Court, would have been

correct. But, such list had neither such purpose nor performed such function.

Appellee is a church advocating and adhering to certain metaphysical practices found in few, if any other, religious organizations. As indicated in the affidavit of appellant [Tr. of Rec. p. 59], which is uncontroverted, a definite and distinct program of training is prescribed for members of the appellee church seeking to qualify themselves as Christian Science practitioners. When qualified, such practitioner follows a professional calling and maintains an office by himself or together with other practitioners, paying the expenses thereof, including necessary telephone services, professional cards and professional services. The furniture in such office also belongs to the practitioner, as do the other prerequisites thereof. Such practitioner attends the needs of his patients by rendering to them metaphysical assistance and the obtaining of such patients is purely a matter of his personal contact or by reference from some other patient or friend. No person is sent to him as the result of any church procedure, and the goodwill and integrity of each practitioner are the controlling situations that cause patients to seek his assistance. Essentially, he is akin to the ordinary medical practitioner, known and used by all persons, other than those of this specific faith.

While it has been contended that any person may practice metaphysical healing, the allegations of the complaint herein, which upon a motion to dismiss, must be deemed as true, indicate that the list herein referred to is the list that indicates the acceptance, approval, authorization and registration of a practitioner by the appellee church [Tr. of Rec. p. 14]. It is akin to the licensing of a physician and surgeon by the state and the placing of his name upon the official registry of such state, as an active licensed

physician and surgeon therein. Recognition of the status of such practitioner is further indicated by a procedure, being set forth in the Church Manual and By-laws for his removal, in the event of misfeasance or nonfeasance [Tr. of Rec. p. 34]. The rights, privileges and license afforded Christian Science practitioners whose names are listed in the Christian Science Journal, are set forth at length in the complaint and are recognized by state and federal authorities, when so listed [Tr. of Rec. p. 23].

Appellant pursued the requisite courses of dedication and education, and upon completion, was qualified as an approved, authorized and registered practitioner by appellee church, since the 15th day of September, 1934. His name was thereafter published in such list without interruption until the 17th day of October, 1949, when it was removed, pursuant to his request of the 12th day of September, 1949, that such name be temporarily removed in order that he might pursue and engage in further study and research in the field of Christian Science [Tr. of Rec. p. 19]. This was in conformity with the Church Manual and By-laws, requiring the devoting of substantially all of the practitioner's time to the practice of Christian Science [Tr. of Rec. p. 15]. A year and one-half later, on or about the 10th day of May, 1951, he made written application to appellees for the resumption of the publication and reinsertion of his name in the official recognized list of Christian Science Practitioners. The refusal and failure of the appellees to comply with this request is the basis of the actionable claim of the first and second counts of appellant's second amended complaint. As set forth in the complaint, the procedure herein followed, was the approved and accepted procedure of Christian Science practitioners, who, for various reasons, were

unable to devote themselves to the profession of a Christian Science practitioner, for given periods of time. It was the established practice of the appellees where there had been a voluntary request to withdraw the name from such list, to reinsert the name of the practitioner upon his subsequent request to do so [Tr. of Rec. p. 22]. While no written contract between any given Christian Science practitioner and the appellee church exists, requiring the appellee church to do so, this was the established method and custom, long followed by the appellees.

No church, or other procedure, has either been filed or pursued by any of the appellees to remove appellant or his name as a Christian Science practitioner, under any church procedure authorized by the "Manual or By-laws" of the appellees or by any other form of judicial proceeding.

It was the theory and purpose of the first and second causes of action of appellant's present complaint, to indicate his qualification, acceptance and recognition by appellees in the profession of a Christian Science practitioner, and that the right to follow such profession, was a *property right* recognized by the laws of the state of California (App. Op. Br. p. 14). That since the same was a "property right," he could not be deprived thereof, except by the church procedure and rules adopted for such purpose, and that the courts, both of the State of California, and the Federal Courts sitting within such state, would determine "if any church tribunal had properly or finally acted and if so, whether the rules of said church had been followed, and if not, what will be the resulting effect on civil and property rights" (App. Op. Br. p. 16).

Bouldin v. Alexander (1872), 82 U. S. 131, 139, 21 L. Ed. 69.

If the appellees may ignore their established practice and custom of allowing a Christian Science practitioner to voluntarily withdraw his name from publication and thereafter having the same reinserted upon demand, in the absence of adherence to a disfranchisement by the established church method therefore, appellees could, at any time, withdraw from any practitioner, his recognition and authorization, by declining to publish his name in any subsequent edition of the list of Christian Science practitioners. If the right to practice Christian Science, be not a property right that would be thereby violated, such procedure could be followed. *But* if the same be a *property right,* such procedure could not be pursued, nor would the indirect procedure herein, be sanctioned.

Berrien v. Pollitzer (1947), 165 F. 2d 21, 23.

In the recent case of *Keeler v. Schulte* (1953), 119 Cal. App. 2d 132, 259 P. 2d 37, the state court held at page 136 of the state citation, "it is fundamental that under the Constitution of the United States (Amendment No. 14), no one shall be deprived of property without 'due process of law'." This case and other cases so holding, are referred to in Appellant's Opening Brief, pages 16, 17 and 18.

It is respectfully submitted that upon the theory that the right to practice Christian Science as a profession after the initial acceptance and recognition by the appellee church, is a "property right" for which a person may not thereafter be deprived by the appellee church, except through proceedings before such an appellee church, in compliance with the procedure established therefore, in the "Manual and By-laws" of such appellee church.

Although there does not appear to be any specific case heretofore decided between a Christian Science practi-

tioner and any of the appellees, upon such subject matter, the same is akin to any other form of professional recognition membership privileges or licensing by any state or other governmental agency, wherein an established procedure is set forth for the disfranchisement of the licensee or member. None of such licensees have any contract with the licensor, be it government, bureau, agency or non-profit corporation, requiring such licensor to continue the recognition or licensing of such party in the absence of established procedure to deprive a party of his rights therein. All of such licensing, permit a person to place themselves in an inactive status and to be reestablished upon request, in an active status. While a form of re-qualification might be required as a requisite thereto, the same is generally not so required and when existing, is set forth in the rules and by-laws, of the organization. Appellees have no such procedure, and such requalification was not required of any of the other practitioners who had theretofore withdrawn their name from the publication, and upon their request, had the same reinserted and their privileges reestablished. If any contractual obligation be deemed requisite to such procedure, the long established practice of appellees as to the reinsertion of names of Christian Science practitioners, after voluntary withdrawals thereof, from the published lists, would indicate an implied contractual obligation, requiring the appellees to afford the same right and privilege to the appellant that it had theretofore afforded to other practitioners.

American Jurisprudence and sense of justice requires that appellant be treated by appellees, in the same manner as other Christian Science practitioners. If appellees desire to do otherwise, proper procedure should have been brought by them to remove appellant, as a Christian Science practitioner.

II.

That a Civil Right of a Pecuniary Nature, Is a Property Right That Will Be Protected by the Courts:

As hereinbefore indicated, appellant acquired the civil right to have himself recognized, accepted and acknowledged as a Christian Science Practioner by the appellees. The placing of his name in the recognized list indicating such acceptance, gave to him specific rights, which rights are set forth in his Second Amended Complaint [Tr. of Rec. p. 24], and are summarized in Appellants' Reply Brief (p. 11). Such rights afforded to him certain recognitions, certain acceptances and certain abilities to obtain for his patients, specialized services, not otherwise available. All of the same not only make such recognitions essential, but make the same requisite to the successful economic practice of the profession of a Christian Science Practitioner. The enjoyment of a *property right* has long been protected by the courts of the State of California, which have not permitted the same to be terminated arbitrarily or capriciously, without just cause and a hearing wherein the party to be deprived of such right, has been afforded an opportunity to be heard.

Grand Grove A. O. D. v. Duchein (1895), 105 Cal. 219, 222;

Ellis v. American Federation of Labor (1941), 48 Cal. App. 2d 440, 445;

Taboada v. Sociedad Espanola, etc. (1923), 191 Cal. 187, 191;

4 Am. Jur., 466, 469, 471;

7 C. J. S., 62.

The courts have held that it is clearly within their power to protect such rights.

Von Arx v. San Francisco Gruetli Verein (1896), 113 Cal. 377, 379;

Horgan v. Metropolitan Mutual Aid Ass'n, 202 Mass. 524, 88 N. E. 890; 27 A. L. R. 1512.

A discussion of the many kinds of rights which have been classified as property rights is unnecessary, but it is important to note that basically and traditionally a property right is one which has a pecuniary value.

In the case of *International News Service v. Associated Press* (1919), 248 U. S. 215, 63 L. Ed. 211, 219, 39 S. Ct. 68, the Supreme Court of the United States has stated:

> *"The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right."* (Emphasis ours.)

To the same effect are:

Fisher v. Star Company, 231 N. Y. 414, 132 N. E. 133;

28 Am. Jur., Sec. 70, p. 264.

The particular kind of organization with which a person was associated has never been a material consideration where there was a deprivation of property without a hearing and without just cause being shown. The courts have prevented the expulsion of members without a hearing from non-profit corporations (*Moustakis v. Hellenic Orthodox Society,* 159 N. E. 453), from benevolent societies and unincorporated associations (*Grand Grove A.O.D. v. Duchein* (1894), 105 Cal. 219; *Knights of*

Klu Klux Klan v. Francis (1926), 79 Cal. App. 383), and from labor unions (*Ellis v. American Federation of Labor* (1941), 48 Cal. App. 2d 440; *Smeterham v. Laundry Workers Union* (1941), 44 Cal. App. 2d 131.) It is a financial interest which is protected, whether it be an undivided ownership of the property of an association, insurance benefits connected with a benevolent society, or the right to earn a living where union membership is necessary.

Just as recognition in an appropriate manner as a union member is necessary for such member to follow his vocation and earn a livelihood, so is the recognition by publication in the official list of practitioners, requisite to the successful economic practice of such profession. The personal right to practice a profession essentially includes the right to obtain the most available and advantageous compensation therefrom.

Modern authorities, including California, hold that equity in proper instances will also protect personal rights.

Orloff v. Los Angeles Turf Club (1947), 30 Cal. 2d 110, 113;

Berrien v. Pollitzer (1947), 165 F. 2d 21, 23; 175 A. L. R. 438 *et seq.*

It is well settled in this State that an organization in expelling one of its members, acts in a quasi-judicial capacity.

Otto v. Tailors' P. & B. Union (1888), 75 Cal. 308, 312;

Taboada v. Sociedad Espanola, etc. (1923), 191 Cal. 187, 191.

Because of this responsibility, many courts in addition to protecting property rights have stated that an expulsion

without a hearing and cause being shown, is invalid because it violates the fundamental principles of natural justice.

Grand Grove, etc. v. Duchein (1895), 105 Cal. 219, 222;

Taboada v. Sociedad Espanola, etc. (1923), 191 Cal. 187, 191;

Gray v. Allison (1909), 25 Times L. 531 (Eng.), 175 A. L. R. 514;

Burns v. National Amalgamated Labourers Union (1920), 2 Ch. (Eng.) (364), 175 A. L. R. 514.

In addition to the principle that basic concepts of justice demand that a person receive a hearing, some courts have stated that the power to expel, is actually penal in nature and ought not to be allowed to affect men's reputations and humiliate them without some reasonable check being imposed.

Berrien v. Pollitzer (1947), 165 F. 2d 21, 23;

D'Arcy v. Adamson (1913), 29 Times L. (Eng.), 367, 175 A. L. R. 514;

Fisher v. Keane (1878), 1 R. 11 Chanc. Div. 353 (Eng.), 175 A. L. R. 507.

In *Berrien v. Pollitzer, supra,* in discussing classes of cases in which a property right was respected in form, but disregarded in substance, the court stated at page 23:

> "One such class involved 'wrongful expulsion from social clubs where the real wrong complained of is the humiliation and injury to feelings. Here . . . courts of equity generally insist upon some shadow of a property interest, however trivial; actually protecting the feelings, but purporting to protect only the pocketbook. . . . Something is found which

> gives the camel's nose legitimate standing in the chancellor's tent, and the whole beast follows in order to dispose of the case completely. Such devices never obtain except when we are dealing with a moribund rule. . . .' *It seems plain that the club member's interest of personality should be the object of consideration regardless of the nature of the club,* and that the real question is whether the injury to these interests is sufficiently serious to warrant judicial interference with the internal affairs of a social organization." (Emphasis ours.)

This case is particularly applicable herein, since the plaintiff therein was not directly expelled from membership in a political party, but was only excluded from its "headquarters". In condemning this indirect procedure, the court further held at page 23,

> "Appellees suggest that appellant has not been expelled. We think the resolution purports to expel her, but we also think it immaterial to the court's jurisdiction whether she has been expelled from membership or merely excluded from a member's essential privilege of using the Party's quarters. She has been excluded without a 'regularly conducted' trial, on due notice, by 'constituted corporate authorities,' and a 'judgment arrived at . . . in good faith.'"

Had a written contract existed between the parties, the actions of the appellees herein would not have been sanctioned by the laws of the State of California, since it is well established that an absolute power of termination is void under contract law.

> *Naify v. Pacific Indemnity Co.* (1938), 11 Cal. 2d 5, 12;
>
> *Fabbro v. Dardi & Co.* (1949), 93 Cal. App. 2d 247, 251.

It is respectfully submitted that the "property rights" of the appellant, is entitled to the protection of the courts and that the first and second counts of the complaint herein, setting forth such property rights, each adequately states an actionable claim.

III.

That the Dismissals Herein, Being Predicated Solely Upon the Alleged Insufficiency of the Pleadings, Should Not Have Been Granted "With Prejudice."

It is an elementary concept of law that each litigant is entitled to "his day in court," and that matters should be adjudicated upon their merits and not upon the technicalities of pleadings. It was to avoid the effects of technical pleadings that resulted in injustices as to the merits of the matter, that the liberalized Federal Rules of Civil Procedure, were adopted.

The within action, as to the first and second causes of action, was not a judicial determination predicated upon the merits of the matter, but solely upon the alleged technical insufficiency of the pleadings [Tr. of Rec. pp. 96, 97].

The prior amendments to the complaint were by reason of the granting of Motions to Quash service of the summons, in each instance, on the ground that the facts of Federal Jurisdiction had not been stated [Tr. of Rec. pp. 3, 7]. That the amendments successfully alleged Federal Jurisdiction, in the Second Amended Complaint, is indicated by the holding of this Honorable Court that such Federal Jurisdiction exists under the allegations of such complaint.

The question of pleadings and the sufficiency thereof, was first considered by the District Court, upon the Motion to Dismiss, herein. Upon the first consideration of

the sufficiency and technicalities of pleading, the District Court granted the Appellees' Motion to Dismiss as to the first and second causes of action of the complaint, under consideration, *with prejudice.*

That a Motion to Dismiss performs the function formerly performed by a common law demurrer, is well established and recognized, particularly in this jurisdiction.

Abram v. San Joaquin Cotton Oil Co. (1942), 46 Fed. Supp. 969, 974;

Flanigan v. Security-First Nat'l Bk. of Los Angeles (1941), 41 Fed. Supp. 77, 79.

Authorities cited in each of the foregoing cases indicate the universal application of this principle of law.

It is respectfully submitted that since, as material a subject matter as the right to pursue a profession, for which the appellant conscientiously and diligently trained and qualified himself, is involved where the technicalities of pleadings are considered for the first time, a Motion to Dismiss should not be granted, with prejudice, and thus precludes the appellant from perfecting his claim and asserting his rights with the ultimate accomplishment of having a determination upon his asserted claims based on the merits thereof.

That upon a Motion to Dismiss, where relief can be granted, no discretion may be exercised by the court, is established in this circuit, in the case of *Yuba Consolidated Gold Fields v. Kilkery* (1953), 206 Fed. 884, where at page 889, this Honorable Court held:

> ". . . On a motion to dismiss the facts properly pleaded in the bill must be taken as established; therefore the motion to dismiss should have been denied. A ruling on a motion to dismiss for failure to state a

claim upon which relief can be granted is a ruling on a question of law and does not admit the exercise of discretion."

The rule as to the liberality of pleading was the subject of the decision of this Honorable Court in *Sidebottom v. Robison* (1954), 216 F. 2d 816, where this Honorable Court considers and evaluates the rule of liberal pleadings, as follows:

"Rule 8 restricts pleadings to a short and plain statement of (1) the grounds for the court's jurisdiction, (2) a similar statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief for which he deems himself entitled. And the courts have applied these rules generously. See, for instance: Leimer v. State Mutual Life Assur. Co., 8 Cir., 1940, 108 F. 2d 302 (claim to portion of proceeds of life insurance policy); United States v. Sinclair Refining Co., 10 Cir., 1942, 126 F. 2d 827, 830-831 (recovery of damages for fraud from agent of Indians); Machado v. McGrath, 1951, 89 U. S. App. D. C. 70, 193 F. 2d 706 (action to declare plaintiff admissible to permanent residence and citizenship in the United States). The reason behind these rulings is well summed upon in Leimer v. State Mutual Assur. Co., *supra,* 108 F. 2d at page 306:

'In view of the means which the Rules of Civil Procedure afford a defendant to obtain a speedy disposition of a claim which is without foundation or substance, by either securing a more definite statement or a bill of particulars under Rule 12(e) and thereafter applying for judgment on the pleadings under Rule 12(h)(1), or by moving for a summary judgment under Rule 56, we think there is no justi-

> fication for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.' "

The foregoing cases have been cited from the numerous Federal cases upon the same subject matter, since they are the most recent cases thereon, decided by the Court of Appeals of this circuit. Other cases supporting such rules are cited in Appellant's Opening Brief (pp. 38, 39).

It is respectfully submitted that assuming, but not conceding the insufficiency of the allegations of the first and second causes of action of the complaint in question, no dismissal should have been granted "with prejudice," but that an opportunity should have been afforded the appellant to rectify the situation by repleading his said causes of action. Such contention is particularly applicable for, as hereinbefore indicated, the Motion to Dismiss herein, was the first time that the sufficiency of the allegations of the pleadings, were considered by the District Court.

As stated in the case of *Topping v. Fry* (1945), 147 F. 2d 715, at page 178:

> "We think plaintiff should have been given an opportunity to clarify his complaint. The very deficiencies of the pleading seem to furnish all the more reason why it should not have been dismissed on defendants' motions without leave to amend. From the welter of immaterial facts stated in the complaint here involved we think it is possible to spell out a cause of action based on allegations of a contract, performance by plaintiff, and failure to perform on the part of at least defendant Fry, and possibly the Company. See Kraus v. General Motors Corpora-

tion, D.C., 27 F. Supp. 537. *Under the liberalized procedure provided for by the new rules, we think it is error to dismiss a complaint with prejudice if it appears that any relief could be granted on the facts stated.* See Cyclopedia of Federal Procedure (2d Ed.) Vol. 5, Section 1601. As stated in Moore's Federal Practice, Vol. 1, Section 8.01, *'Litigation is not an art in writing nice pleadings. It can and should seldom be settled on its merits at the pleading stage. . . .'"* (Emphasis ours.)

That this Honorable Court may, in the furtherance of justice, where the District Court has ordered a dismissal, with prejudice, modify such order by providing that "the judgment is modified to provide for dismissal but not for dismissal upon the merits," is authorized by the holding of *Producers Releasing Corporation, etc. v. P. R. C. Pictures* (1949), 176 F. 2d 93, 96.

Conclusion.

It is respectfully submitted that the facts set forth in the first and second causes of action of Appellant's Second Amended Complaint, indicate the existence of a *property right* in favor of appellant, which has been violated by the conduct, including both misfeasance and nonfeasance, of the appellees. That such property right is a right recognizable under the laws of the State of California and the Federal Courts, sitting within said state. That the cases herein cited arising in the Commonwealth of Massachusetts indicate that such right is recognizable under the laws of the jurisdiction wherein the corporate appellees, obtained their *"de jure"* existence. It is further

respectfully submitted that since the dismissal granted by the District Court herein was not on the merits of the matter, but was upon the technical and sufficiency of the pleadings, and since the same was the first consideration thereof by the District Court, that the dismissal *with prejudice* of said causes of action, was both inequitable and improper, under established principles of law.

For the aforesaid reasons, appellant respectfully prays and requests that this Honorable Court grant him a rehearing of that portion and part of the decision of this Honorable Court, rendered on the 30th day of August, 1955, which holds and determines that said first and second causes of action of said complaint are not actionable claims and that the dismissal thereof, *with prejudice*, granted by the District Court, was proper. Appellant further prays and requests that in such rehearing had by this Honorable Court thereon, it being either held that each and both of said causes of action, are actionable claims upon the theory of the violation of the *property right* of appellant, or that the dismissal thereof be modified by this court to indicate that the same, as to each causes of action, are without prejudice and not upon the merits of the matter.

Respectfully submitted,

EUGENE L. WOLVER,

Attorney for Appellant.

Certificate of Counsel.

I, Eugene L. Wolver, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

EUGENE L. WOLVER,
Attorney for Petitioner.